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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1600

ANTHONY M. SALONE, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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ANTHONY M. SALONE, JR.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, Anthony Salone, Jr., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on February 21, 1975.

Opinions Below

The opinion of the Court of Appeals is reported at 511 F.2d 902 and is set out in the Appendix hereto, pp. 8a-12a. The opinion of the District Court which is not yet officially reported, is reprinted at 7 EPD ¶9376 (D.Okl. 1974) and is set out in the Appendix hereto, pp. 1a-7a.

Jurisdiction

The judgment of the Court of Appeals was entered on February 21, 1975. On May 2, 1975, Justice White issued

an order extending the time in which the Petition for Writ of Certiorari must be filed until June 21, 1975. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Is a federal employee who sues under section 717 of the 1964 Civil Rights Act claiming racial discrimination in employment entitled to the same trial *de novo* required for private employees by *McDonnell-Douglas Corp* v. *Green*, 411 U.S. 792 (1973)?*

Statutory Provisions Involved

Section 717(c) of Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. § 2000e-16(c), provides:

> Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex, or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the

* A similar question is presented by the Petition for Writ of Certiorari in *Chandler* v. *United States*, No. 74-[illegible]

> failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Section 717(d) of Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. § 2000e-16(d), provides:

> The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder.

Statement of the Case

Petitioner Anthony M. Salone, Jr., is a black civilian employee in the Materials Processing Division at Tinker Air Force Base, Oklahoma. In February, 1967, petitioner filed an administrative complaint alleging that he had been denied promotion because of his race. On April 9, 1967, petitioner was promoted from a W-6 warehouseman to a GS-5 Supply Clerk. On October 17, 1967, the base Equal Employment Officer concluded that Salone had been subjected to unfair disciplinary actions because of his race.[1] Certain references to disciplinary actions were expunged from Salone's personnel file, a ten day suspension was cancelled retroactively, and petitioner was provided back pay for that period of suspension.[2] Petitioner filed another complaint of discrimination on July 31, 1970, as a result of which his supervisors agreed that he would be given a new supervisory appraisal in September 1970.

On April 11, 1972, petitioner wrote to the base commander complaining that he had been discriminated against

[1] Letter of Leroy W. Kirk to Anthony M. Salone, Jr., pp. 3-4.

[2] Letter of Theodore D. Wheaton, Chief, Civilian Personnel Division, to Anthony M. Salone, Jr., undated.

by three present and former supervisors because of his race and in retaliation for having filed the 1967 complaint of racial discrimination. Petitioner complained in particular that, because of this discrimination, he had been consistently given lower performance appraisals than less qualified white workers, and submitted in support of his complaint a letter signed by twelve co-workers, both black and white, alleging discrimination against him. The E.E.O. counsellor conducted an investigation into this complaint, and reported on June 13, 1972, that management had been unable to produce any records, tangible information or other evidence to support the higher appraisal given to Salone's white co-worker and noted that that co-worker had been given a particularly easy assignment.[3] The counsellor recommended that Salone be given a new performance appraisal. Petitioner's supervisors, however, apparently refused to accept this recommendation.

On June 28, 1972, Salone filed a formal complaint of discrimination and requested a more extensive investigation. Two investigators from another Air Force base conducted such an inquiry from July 19, 1972 through August 29, 1972. The report of the investigation, dated August 31, 1972, found a pattern of unfair "favoritism" within Salone's unit, and concluded that that unit was "a fertile place for complaints unless top management is made aware of this condition and [if] efforts are not initiated to correct this situation, there will be more complaints generating from this organization." Although the report did not directly address many of Salone's allegations, it concluded that the unit's method of recording defects in performance was "totally inadequate," and revealed that during the period considered all personnel

[3] Appeals Examiner's Report, p. 5.

promoted above petitioner's level were white.[4] On October 5, 1972, a meeting was held with the Chief E.E.O. Counselor to consider this report, but the management representative refused to discuss what corrective action might be taken.[5] On November 10, 1972, the base commander issued a decision summarily rejecting the investigator's finding of favoritism and Salone's charges of discrimination.[6]

Thereafter Salone requested that a hearing be held by an Appeals Examiner from outside the Department of the Air Force. That hearing was held on January 8 and 9, 1973, and the Examiner issued a 23 page Recommended Decision on February 9, 1973. The hearing examiner concluded that, as he had claimed, petitioner had been the victim of acts of reprisal for his 1967 and 1970 complaints:

> Careful review, study and consideration of the total record compiled in this case leads me to conclude that Mr. Salone has been the victim of systematic, continuous discrimination within the Material Processing Division. The evidence is overwhelming that, because of previous discrimination complaints which he pursued in 1967 and 1970, Mr. Salone has been branded as a "trouble maker" and has in numerous respects been treated differently from whites and, in many cases differently from other blacks who have not filed discrimination complaints.

[4] Report of Investigation, pp. 8, 12-13.

[5] Appeals Examiner's Report, p. 16.

[6] Letter of General W.Y. Smith to Anthony J. Salone, Jr. General Smith rejected the allegation of reprisal and discrimination solely because he concluded that Salone had not been discriminated against in 1967. General Smith rejected the finding of favoritism on the ground that the positions given the favored employees were not supposed to be different from or preferable to the other positions in the unit. Whether they were in fact different or preferable he did not purport to decide.

> . . . In my opinion this treatment of Mr. Salone came about because he has exercised in the past his legal rights to present complaints of discrimination.[7]

The Appeals Examiner also stated

> Aside from the fact that Mrs. Jean Massie, Mr. Calvin Rees, Mr. Bill Tomlinson and others have partial responsibility for the treatment of Mr. Salone, I conclude that Mrs. Massie has demonstrated prejudice against Negroes generally . . . [T]here is every likelihood that Mrs. Massie has consciously denied Mr. Salone the opportunity to perform duties . . . the performance of which he feels would enhance . . . his promotional chances.[8]

The Examiner also concluded that "those of management charged with the responsibility of attempting to resolve Mr. Salone's complaint informally have not acted in good faith." [9] He recommended that disciplinary action be taken against Massie, Rees and Tomlinson, and that "immediate and continuing steps" be taken to end the acts of reprisal.[10] The Examiner reasoned that Salone's last performance appraisal was so high that it was not tainted by discrimination, and did not discuss what compensatory action should be taken to redress the past acts of reprisal.

Under the Civil Service Commission regulations, however, these findings of discrimination were not binding on the defendant agency, but were referred to the Secretary of the Air Force for final disposition. On March 9, 1973

[7] Appeals Examiner's Report, pp. 19-20.

[8] Id., p. 21.

[9] Id., p. 20.

[10] Id., p 23.

the Department's Director of Equal Opportunity, acting for the Secretary, rejected the findings of discrimination and the recommendations for disciplinary action and an end to acts of reprisal. Although the applicable regulations require an agency to give an explanation of its reasons for overturning an Examiner's report favorable to the complaint,[11] the Director stated simply that the evidence in the record "does not support your allegations of discrimination based on race." [12] On July 30, 1973, the Agency's decision was affirmed by the Board of Appeals and Review of the United States Civil Service Commission.

On August 31, 1973, petitioner commenced this action in the United States District Court for the Western District of Oklahoma to reinstate the hearing examiner's finding of discrimination and for back pay and exemplary damages. The sworn statements in the administrative record presented genuine disputes of material fact regarding whether Salone had been discriminated against on the basis of race, whether he had been subject to reprisals for filing complaints of discrimination in the past, whether there was a general pattern of racial discrimination in Salone's office, and whether as a result Salone had suffered unfair supervisory appraisals and been denied equal opportunity to gain new work experience compared to whites. Notwithstanding this conflict in the record, the government moved for summary judgment.[13] On April 30, 1974, the District

[11] 5 C.F.R. § 713.221(b)(2).

[12] Letter of James P. Goode to Anthony M. Salone, p. 1.

[13] The sole ground urged by the government for dismissing the section 717 count was petitioner's alleged failure to name as a defendant the Secretary of the Air Force, which it claimed was an indispensable party. Motion for Summary Judgment dated April 2, 1974, p. 4. In fact the Complaint did name the Secretary as a defendant. On March 5, 1974, the government filed a motion to dismiss on the ground that the Secretary was not a proper defendant. Motion to Dismiss, p. 1.

Court granted what it described as "Defendants' Motion for Summary Judgment affirming the decision of the Board of Appeals and Review, United States Civil Service Commission [and] affirming the decision of the Secretary of the Air Force." P. 7a. The district court reasoned that it was not authorized "to make an independent determination of the facts", but was required to affirm the Secretary's decision unless it was against the "clear weight of the evidence." P. 5a. The District Court thus concluded that it could not afford plaintiff the trial *de novo* which he sought. On February 21, 1975, the Court of Appeals for the Tenth Circuit affirmed.

REASONS FOR GRANTING THE WRIT

I.

The Decision of the Tenth Circuit Is in Conflict With Two Courts of Appeals and Numerous District Courts.

In the courts below petitioner argued that he was entitled to the same trial *de novo*[14] accorded to private employees under *McDonald-Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). He maintains that, in an action under section 717, the district courts are obligated to make an independent determination as to whether there was racial discrimination and that, in support of his contentions, he was entitled to develop by discovery and introduce all relevant evidence not limited to the administrative record. Both lower courts rejected this contention.

[14] The plenary judicial consideration which petitioner seeks of his claims is not technically a trial *de novo*, since the prior agency proceedings involve few of the indicia of a trial. See p. 27, *infra*. The phrase "trial *de novo*" is used herein because solely because those words have become the conventional manner of referring to a *McDonnell-Douglas* plenary hearing.

The Court of Appeals held that section 717 did not authorize a *McDonnell-Douglas* trial *de novo*, and that in such an action alleging federal employment discrimination Title VII only authorized the District Court to make a "review of the administrative record." P. 10a. The Tenth Circuit reasoned that section 717 only provided for "access" to the courts, and did not authorize the courts to decide discrimination claims on the merits. P. 11a. If the administrative record was critically deficient, it reasoned, the district court was not to seek additional evidence itself, but must remand the case to the agency whose subsequent decision would then be subject to limited judicial review. P. 12a. The Court of Appeals held that the District Court's two sentence analysis of the 500 page administrative record gave "sufficient indication of the facts relied on by him from the administrative record to support his conclusions as to the administrative decision."[15] The position taken by the Tenth Circuit is essentially that heretofore advanced by the government in this and other cases.

The decision of the Tenth Circuit is squarely in conflict with the decision of the Third Circuit in *Sperling* v. *United States*, 9 EPD ¶ 10,100 (3d Cir. 1975). *Sperling* expressly upheld the contention rejected in this case, and required a *de novo* trial in every action under section 717. The Third Circuit held that the district courts must make an independent determination as to whether there has been unlawful discrimination after considering whatever evidence, not limited to the administrative record, the plaintiff wants to introduce. 9 EPD pp. 7489-7492. The Third Circuit rejected the remand procedure authorized by the Tenth Circuit, disapproved the district court decision in *Salone*, ex-

[15] In fact, of those two sentences, one was completely erroneous and the other referred to evidence irrelevant to the primary complaint of discriminatory reprisal. See p. 20, n. 48, *infra*.

pressly declined to follow the precedents relied on by the Tenth Circuit,[16] and relied on precedents which the Tenth Circuit had declined to follow.[17]

The decisions of both the Third and Tenth Circuits are in conflict with the decision of the Ninth Circuit in *Chandler* v. *Johnson*, 9 EPD ¶ 10,123 (9th Cir. 1975). *Chandler*, unlike *Salone*, apparently requires the district court to make an independent determination as to whether there was racial discrimination, but, unlike *Sperling*, limits the evidence to the administrative record except under certain circumstances.[18] See *Bowers* v. *Campbell*, 8 EPD ¶ 9752, p. 6138 (9th Cir. 1974).[19] The Ninth Circuit expressly rejected "both polar positions" that *de novo* trials are required in every case, as in *Sperling*, and are never appropriate, as in *Salone*. 9 EPD p. 7562.

The conflict on this issue among the district courts, though more complex than that among the courts of appeals, parallels the conflict among *Salone*, *Sperling* and *Chandler*.

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[16] The Tenth Circuit relied on, and the Third Circuit declined to follow, *Hackley* v. *Johnson*, 360 F.Supp. 1247 (D.D.C. 1973), *Handy* v. *Gayler*, 364 F.Supp. 676 (D. Md. 1973), and the decision in *Thompson* v. *Department of Justice* at 382 F.Supp. 762 (N.D. Cal. 1974).

[17] The Third Circuit relied on, and the Tenth Circuit declined to follow, *Henderson* v. *Defense Contract Administration*, 370 F.Supp. 180 (S.D.N.Y. 1973) and the decision in *Thompson* v. *Department of Justice* at 360 F.Supp. 255 (N.D. Cal. 1973).

[18] "A plaintiff might show that the administrative record is inadequate, or that the hearing officer cut short the proceedings in a manner that prevented a fair presentation of the plaintiff's case; or that, without judicial discovery, a case could not be made." 9 EPD p. 7562.

[19] "[T]he district court must bear the ultimate responsibility for determining the facts underlying the dispute."

(1) Thirteen district courts have adopted the rule of *Sperling* and required a *McDonnell-Douglas de novo* trial in all cases under section 717.[20] Two other courts have denied such a trial in name but given such a trial in substance.[21]

(2) Twenty district court decisions have adopted rules similar to that urged by the government and adopted by the Tenth Circuit in the instant case. Six of these decisions require that the administrative decision be upheld if supported by "substantial evidence."[22] Six courts require judgment for the defendants if the administrative decision is supported by substantial evidence and is not arbitrary or capricious.[23] Three decisions limit the court to determin-

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[20] *Boston* v. *Naval Station*, 10 FEP Cas. 649 (E.D. Va. 1974); *Foster* v. *United States Civil Service Commission*, 9 EPD ¶ 9887 (S.D. Tex. 1974); *Griffin* v. *United States Postal Service*, 7 EPD ¶ 9133 (M.D. Fla. 1973); *Harris* v. *Ulanich*, No. 73-369-N, E.D. Va., opinion dated November 14, 1974; *Henderson* v. *Defense Contract Administration*, 370 F.Supp. 180 (S.D.N.Y. 1973); *Hill* v. *Seamens*, 9 EPD ¶ 10,095 (S.D. Tex. 1975); *Hunt* v. *Schlesinger*, 9 EPD ¶ 10,024 (W.D. Tenn. 1974); *Jackson* v. *United States Civil Service Commission*, 379 F.Supp. 589 (S.D. Tex. 1973); *Levens* v. *General Services Administration*, 10 FEP Cas. 493 (W.D. Mo. 1975); *Reynolds* v. *Wise*, 8 EPD ¶ 9777 (N.D. Tex. 1973); *Robinson* v. *Klassen*, 9 EPD ¶ 9954 (E.D. Ark. 1974); *Sylvester* v. *United States Postal Service*, No. 73-H-220, S.D. Tex., opinion dated April 23, 1975; *Chisholm* v. *United States Postal Service*, No. C-C-73-148, W.D. N.C., opinion dated May 29, 1975.

[21] *Johnson* v. *United States Postal Service*, 8 EPD ¶ 9548 (N.D. Fla. 1974); 364 F.Supp. 37 (N.D. Fla. 1973); *Robinson* v. *Warner*, 8 EPD ¶ 9542 (D.D.C. 1974).

[22] *Cates* v. *Johnson*, 377 F.Supp. 1145 (W.D. Pa. 1974); *Evans* v. *Johnson*, 7 EPD ¶ 9351 (C.D. Cal. 1974); *Fisher* v. *Brennan*, 10 FEP Cas. 685 (E.D. Tenn. 1974); *Leinster* v. *Engman*, 8 EPD ¶ 9774 (D.C.C. 1974); *Roberts* v. *Mumford*, 8 EPD ¶ 9692 (D.D.C. 1974); *Smith* v. *Snyder*, 381 F.Supp. 1083 (E.D. Pa. 1974).

[23] *Allen* v. *Veterans Administration*, 8 EPD ¶ 9783 (W.D. Pa. 1974); *Coopersmith* v. *Johnson*, 7 EPD ¶ 9388 (D.D.C. 1974); *Ettinger* v. *Johnson*, 10 FEP Cas. 642 (E.D. Pa. 1974); *Handy*

ing whether the administrative decision has a "rational basis",[24] three courts limit the court's role to "judicial review",[25] and three other decisions formulate still different standards which seem within the *Salone* family.[26]

(3) Twelve decisions, like *Chandler*, require the district court to make an independent determination as to whether there was discrimination, but limit plaintiff's right to introduce evidence other than the administrative record. Seven decisions have adopted the standard first fashioned in *Hackley* v. *Johnson*, 360 F.Supp. 1247 (D.D.C. 1973), which requires judgment for the government if the administrative record "affirmatively establish[es] by the clear weight of the evidence" the absence of discrimination, and if not provides that the court may either grant a *de novo* trial, remand to the agency, or grant plaintiff relief on the administrative record.[27] Three decisions require the court

v. *Gayler*, 364 F.Supp. 676 (D. Md. 1973); *Nimitz* v. *Berzak*, 7 EPD ¶ 9273 (E.D. La. 1974); *Russell* v. *Johnson*, 10 FEP Cas. 924,926 (W.D. Pa. 1975).

[24] *Gautier* v. *Weinberger*, 6 EPD ¶ 9001 (D.D.C. 1973); *Roney* v. *Saxbe*, 8 EPD ¶ 9587 (D.D.C. 1974); *Smith* v. *Gunther*, 9 EPD ¶ 9915 (D.D.C. 1975).

[25] *Spencer* v. *Schlesinger*, 374 F.Supp. 840 (D.D.C. 1974); *Ficklin* v. *Sabatini*, 8 EPD ¶ 9829 (E.D. 1974); *Thompson* v. *Department of Justice*, 372 F.Supp. 762 (N.D. Cal. 1974).

[26] *Marshall* v. *United States Federal Highway Administrator*, 7 EPD ¶ 9184 (D.D.C. 1973) (administrative decision upheld if supported by "substantial grounds"); *Tomlin* v. *Air Force Medical Center*, 369 F.Supp. 353 (S.D. Ohio 1974) (administrative decision upheld unless it was "unfair or arbitrary action") *McGowan* v. *United States Information Agency*, 8 EPD ¶ 9787 (D.D.C. 1974) (substantial evidence standard, if not met than *de novo* trial, remand, or judgment for plaintiff).

[27] *Bernardi* v. *Butz*, 7 EPD ¶ 9381 (N.D. Cal. 1974); *Guilday* v. *United States Department of Justice*, 8 EPD ¶ 9817 (D. Del. 1974); *Caro* v. *Schultz*, 9 EPD ¶ 9987 (N.D. Ill. 1975); *Eastland* v. *Tennessee Valley Authority*, 9 EPD ¶ 9927 (N.D. Ala. 1975); *McLaughlin* v. *Callaway*, 9 EPD ¶ 9888 (S.D. Ala. 1974); *Williams* v. *Mumford*, 6 EPD ¶ 8785 (D.D.C. 1973).

to make "an independent judgment" as to whether there was discrimination, but limit the evidence to the administrative record except where other evidence was previously unknown, unavailable or excluded at the administrative hearing.[28] Two courts limit their role to "review of the record" but allow plaintiffs to supplement the record "for cause shown."[29]

(4) Five decisions have denied trial *de novo* without articulating the applicable standard,[30] and three other courts have adopted *sui generis* rules.[31]

This conflict is not inadvertent. In addition to the Third and Tenth Circuits, twenty district courts have noted the widespread disagreement as to whether section 717 requires a *McDonnell-Douglas de novo* trial, expressly or tacitly disapproving the line of cases not followed.[32] The

[28] *Abrams* v. *Johnson*, 7 EPD ¶ 9380 (N.D. Ohio 1974); *Carreathers* v. *Alexander*, 9 EPD ¶ 9858 (D. Colo. 1974); *Hockett* v. *Administrator of Veterans Affairs*, 8 EPD ¶ 9645 (N.D. Ohio 1974).

[29] *Baca* v. *Butz*, 376 F. Supp. 1005 (D.N. Mex. 1974); *Brooks* v. *Lynn*, 10 FEP Cas. 638 (W.D. Okl. 1974).

[30] *Pendleton* v. *Schlesinger*, 8 EPD ¶ 9598 (D.D.C. 1974); *Pointer* v. *Sampson*, 62 F.R.D. 689 (D.D.C. 1974); *Richerson* v. *Fargo*, 64 F.R.D. 393 (E.D. Pa. 1974); *Richardson* v. *Hampton*, 373 F.Supp. 833 (D.D.C. 1974); *Archuleta* v. *Callaway*, No. 74-M-213, D.Colo., opinion dated November 20, 1974.

[31] *Haire* v. *Callaway*, 9 FEP Cas. 168 (E.D. Mo. 1974) (administrative decision upheld if supported by "preponderance of the evidence"); *Thomas* v. *Department of State*, 8 EPD ¶ 9622 (D.D.C. 1974) (*Hackley* standard without provision for *de novo* trial if standard not met); *Wormley* v. *Department of the Navy*, 8 EPD Cas. 1008 (N.D. Cal. 1974) (administrative decision must meet both *Hackley* and substantial evidence standard.)

[32] *Salone* v. *United States*, p. 10a; *Sperling* v. *United States*, 9 EPD ¶ 10,100, pp. 7489-90 (3d Cir. 1975); *Allen* v. *Veterans Administration*, 8 EPD ¶ 9783, p. 6276 (W.D. Pa. 1974); *Baca* v. *Butz*, 376 F.Supp. 1005, 1007, n.3 (D.N. Mex. 1974); *Boston* v. *Naval Air Station*, 10 FEP Cas. 649, 652, n.2 (E.D. Va. 1974);

disagreement as to the proper standard among courts rejecting *de novo* trials is equally open and notorious. In adopting the substantial evidence rule, the courts in *Smith* v. *Gunther,* 9 EPD ¶ 9914, p. 6803, n. 1 (D.D.C. 1975) and *Leinster* v. *Engman,* 8 EPD ¶ 9774 (D.D.C. 1974) expressly rejected the "different standard of review" established in *Hackley. Smith* v. *Snyder,* 381 F. Supp. 1083 (E.D. Pa. 1974) rejected the more liberal standard of *Carreathers* v. *Alexander,* 9 EPD ¶ 9858 (D. Colo. 1974). The government, which supports the substantial evidence rule, has opposed adoption of the *Hackley* rule as an "insult" to the Civil Service Commission. *Guilday* v. *United States Department of Justice,* 8 EPD ¶ 9817, p. 6434 (D. Del. 1974). The court in *Guilday* v. *United States Department of Justice,* 8 EPD ¶ 9817, p. 6433 (D. Del. 1974) disapproved the substantial evidence standard adopted by three other cases and applied instead the *Hackley* rule. The court which fashioned the liberal rule announced in *Abrams* v. *Johnson,* 7 EPD ¶ 9380, p. 7715 (N.D. Ohio 1974) expressly declined to follow

Caro v. *Schultz,* 9 EPD ¶ 9987, p. 7114 (N.D. Ill. 1975); *Carreathers* v. *Alexander,* 9 EPD ¶ 9858, p. 6565 (D. Colo. 1974); *Eastland* v. *Tennessee Valley Authority,* 9 EPD ¶ 9927, p. 6883 (N.D. Ala. 1975); *Ficklin* v. *Sabatini,* 8 EPD ¶ 9829, p. 6458, n.3 (E.D. Pa. 1974); *Guilday* v. *United States Department of Justice,* 8 EPD ¶ 9817, p. 6433 (D. Del. 1974); *Haire* v. *Callaway,* 9 FEP Cas. 168, 169 (E.D. Mo. 1974); *Harris* v. *Ulanich,* Civil No. 73-369-N, E.D. Va., opinion dated No. 14, 1974, pp. 3, 8; *Pendleton* v. *Schlesinger,* 8 EPD ¶ 9298, p. 5569 (D.D.C. 1974); *Robinson* v. *Klassen,* 9 EPD ¶ 9954, p. 7002 (E.D. Ark. 1974); *Smith* v. *Snyder,* 381 F.Supp. 1083, 1085 (E.D. Pa. 1974); *Spencer* v. *Schlesinger,* 374 F.Supp. 840, 843 (D.D.C. 1974); *Thomas* v. *Department of State,* 8 EPD ¶ 9622, p. 5661 (D.D.C. 1974); *Russell* v. *Johnson,* 10 FEP Cas. 924, 925, nn. 3-4 (M.D. Pa. 1975); *Archuleta* v. *Callaway,* No. 74-M-213, D. Colo., decision dated November 20, 1974, slip opinion, pp. 5-7; *Sylvester* v. *United States Postal Service,* No. 73-H-220, S.D. Tex., opinion dated April 23, 1975, slip opinion, pp. 3-4; *Chisholm* v. *United States Postal Service,* No. C-C-73-148, W.D.N.C., opinion dated May 29, 1975, slip opinion p. 10.

Hackley.[33] The confusion and conflicts are so widespread that in four instances district courts have entertained motions for reconsideration and reversed their own decisions as to the proper standard.[34] In four other cases lower courts, rather than guess the correct standard, have issued decision with alternative holdings under different standards.[35]

This widespread conflict as to the correct standard arises from an equally broad disagreement as to the underlying legal principles. The Third Circuit and five district courts conclude that section 717 was intended to give federal employees the same judicial remedy as was already ac-

[33] "In some respects the procedure which this court has determined should follow in the trial of this civil action varies from the procedure just described by Judge Gesell. The difference arises really at two points. It is concluded that the supplementation question should be resolved before the court proceeds to render its independent judgment of the evidentiary record. Also, applying *McDonnell-Douglas Corp., supra,* it is concluded that the initial burden of proof rests upon the plaintiff in this Title VII civil action, and not on the agency, as Judge Gesell determines."

[34] *Boston* v. *Naval Station,* 10 FEP Cas. 649 (E.D. Va. 1974) (first decision held no *de novo* trials; second decision held *de novo* trials required); *Carreathers* v *.Alexander,* 7 EPD ¶ 9379, 9 EPD ¶ 9858 (D. Colo. 1974) (first decision held *de novo* trials required; second decision adopted *Abrams* standard); *Spencer* v. *Richardson,* 6 EPD ¶ 8906 (D.D.C. 1973), vacated *sub nom. Spencer* v. *Schlesinger,* 374 F.Supp. 840 (D.D.C. 1974) (first decision held *de novo* trials required; second decision held court was only to review the administrative record); *Thompson* v. *Department of Justice,* 360 F.Supp. 255 (N.D. Cal. 1973); 372 F.Supp. 762 (N.D. Cal. 1974) (first decision held *de novo* trials required; second decision seems to adopt *Hackley* standard.)

[35] *Harris* v. *Ulanich,* No. 73-369-N, E.D. Va., opinion dated November 14, 1974 (*De novo* and *Hackley* standard); *Wormley* v. *Department of the Navy,* 8 FEP Cas. 1008 (N.D. Cal. 1974) (*Hackley* and "substantial evidence" rule); *McGowan* v. *United States Information Agency,* 8 EPD ¶ 9787 (D.D.C. 1974) ("substantial evidence" rule and "a stricter standard"); *Chisholm* v. *United States Postal Service,* No. C-C-73-148, W.D.N.C., opinion dated May 29, 1975 (*De novo* and *Hackley* standard).

corded to private employees;[36] the Ninth and Tenth Circuits and seven district courts, however, insist that Congress wanted to limit federal employees to a judicial remedy different from and inferior to that provided for private employees.[37] The Tenth Circuit and eleven district courts argue that section 717 was not intended to alter the severe restrictions which existed prior to 1972 on the scope of judicial scrutiny of administrative decisions, and apply the pre-717 standard announced in decisions such as *Polcover* v. *Secretary of the Treasury*, 477 F.2d 1223 (D.C. Cir. 1973,[38] but the Third Circuit and three district courts insist that section 717 was adopted precisely for the pur-

[36] *Sperling* v. *United States*, 9 EPD ¶ 10,100, p. 7492 (3d Cir. 1975); *Griffin* v. *United States Postal Service*, 7 EPD ¶ 9133, p. 6752 (M.D. Fla. 1973); *Jackson* v. *United States Civil Service Commission*, 379 F.Supp. 589 (S.D. Tex. 1973); *Robinson* v. *Klassen*, 9 EPD ¶ 9954, p. 7002 (E.D. Ark. 1974); *Sylvester* v. *United States Postal Service*, No. 73-H-220, S.D. Tex., opinion dated April 23, 1975; *Chisholm* v. *United States Postal Service*, No. C-C-73-148, W.D.N.C., opinion dated May 29, 1975.

[37] *Salone* v. *United States*, p. 12a; *Chandler* v. *Johnson*, 9 EPD ¶ 10,123, p. 7562 (9th Cir. 1975); *Baca* v. *Butz*, 376 F.Supp. 1005, 1009 (D.N. Mex. 1974); *Ficklin* v. *Sabatini*, 8 EPD ¶ 9829, p. 6459 (E.D. Pa. 1974); *Haire* v. *Callaway*, 9 FEP Cas. 168, 169 (E.D. Mo. 1974); *Handy* v. *Gayler*, 364 F.Supp. 676, 678 (D. Md. 1973); *Pendleton* v. *Schlesinger*, 8 EPD ¶ 9598, p. 5570 (D.D.C. 1974); *Pointer* v. *Sampson*, 62 F.R.D. 689, 694 (D.D.C. 1974); *Spencer* v. *Schlesinger*, 374 F.Supp. 840, 844 (D.D.C. 1974).

[38] *Salone* v. *United States*, p. 10a; *Allen* v. *Veterans Administration*, 8 EPD ¶ 9783, p. 6276 (W.D. Pa. 1974); *Coopersmith* v. *Johnson*, 7 EPD ¶ 9388 (D.D.C. 1974); *Gautier* v. *Weinberger*, 6 EPD ¶ 9001, p. 6254 (D.D.C. 1973); *Handy* v. *Gayler*, 364 F.Supp. 676, 679 (D. Md. 1973); *Leinster* v. *Engman*, 8 EPD ¶ 9774, p. 6242 (D.D.C. 1974); *Marshall* v. *United States Federal Highway Administrator*, 7 EPD ¶ 9184, p. 6941 (D.D.C. 1973); *McGowan* v. *United States Information Agency*, 8 EPD ¶ 9787, p. 6304 (D.D.C. 1974); *Roberts* v. *Mumford*, 8 EPD ¶ 9692, p. 5896 (D.D.C. 1974); *Roney* v. *Saxbe*, 8 EPD ¶ 9587, p. 5550 (D.D.C. 1974); *Smith* v. *Snyder*, 381 F.Supp. 1083, 1087 (E.D. Pa. 1974); *Russell* v. *Johnson*, 10 FEP Cas 924 (W.D. Pa. 1975).

pose of overcoming these restrictions.[39] The Third Circuit and two district courts maintain that the legislative history of section 717 compels a trial *de novo*,[40] four district courts decisions assert that it precludes a *de novo* trial,[41] and the Ninth and Tenth Circuits together with four other district courts find the legislative history inconclusive.[42] A similar conflict exists among the lower courts as to whether a trial *de novo* is required in section 717 cases by this Court's decisions in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) and *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).[43]

[39] *Sperling* v. *United States*, 9 EPD ¶ 10,100, p. 7490 (3d Cir. 1975); *Abrams* v. *Johnson*, 7 EPD ¶ 9380, p. 7713 (N.D. Ohio 1974); *Griffin* v. *United States Postal Service*, 7 EPD ¶ 9133, p. 6752 (M.D. Fla. 1973); *Guilday* v. *United States Department of Justice*, 8 EPD ¶ 9817, p. 6433 (D. Del. 1974).

[40] *Sperling* v. *United States*, 9 EPD ¶ 10,100, p. 7490-91 (3d Cir. 1975); *Henderson* v. *Defense Contract Administration*, 370 F.Supp. 180, 184 (S.D.N.Y. 1973); *Reynolds* v. *Wise*, 8 EPD ¶ 9777, p. 6251 (N.D. Tex. 1973).

[41] *Hackley* v. *Johnson*, 360 F.Supp. 1247 (D.D.C. 1973); *Handy* v. *Gayler*, 364 F.Supp. 676, 678 (D. Md. 1973); *McLaughlin* v. *Callaway*, 382 F.Supp. 885, 890 (S.D. Ala. 1974); *Spencer* v. *Schlesinger*, 374 F.Supp. 840, 844 (D.D.C. 1974).

[42] *Salone* v. *United States*, p. 11a; *Chandler* v. *Johnson*, 9 EPD ¶ 10,123, p. 7562 (9th Cir. 1975); *Guilday* v. *United States Department of Justice*, 8 EPD ¶ 9817, p. 6432 (D. Del. 1974); *Harris* v. *Ulanich*, No. 73-369-N, E.D. Va., slip opinion, Nov. 14, 1974, p. 8; *Sylvester* v. *United States Postal Service*, No. 73-H-220, S.D. Tex., opinion dated April 23, 1975; *Chisholm* v. *United States Postal Service*, No. C-C-73-148, W.D.N.C., opinion dated May 29, 1975.

[43] *Compare Sperling* v. *United States*, 9 EPD ¶ 10,100, p. 7489, n.40 (3d Cir. 1975) (relying on *Alexander* and *McDonnell-Douglas*); *Boston* v. *Naval Station*, 10 FEP Cas. 649, 654 (E.D. Va. 1974) (relying on *Alexander*); *Harris* v. *Ulanich*, No. 73-369-N, E.D. Va., slip opinion November 14, p. 10 (relying on *Alexander*); *Hunt* v. *Schlesinger*, 9 EPD ¶ 10,024, p. 7242 (W.D. Tenn. 1974) (relying on *McDonnell-Douglas*); *with Chandler* v. *Johnson*, 9 EPD ¶ 10,123, p. 7562 (9th Cir. 1975) (distinguishing *Alexander* and *McDonnell-Douglas*); *Salone* v. *United States*, p. 10a (dis-

II.

The Question Presented Is of Substantial Importance.

At issue in this case is an effort by the executive branch to obtain judicial nullification of a statute passed by Congress over the objections of the Civil Service Commission. The Department of Justice, urging that *McDonnell-Douglas* *de novo* trials are impermissible, moves "as a matter of course" in virtually every section 717 action for summary judgment on the administrative record. *Guilday* v. *United States Department of Justice*, 8 EPD ¶ 9817, p. 6432 (D. Del. 1974). In the last two years[44] there have been more than 50 district court decisions on this question, which has also been decided in three courts of appeals and is pending in three others.[45] Even the courts which have denied trials *de novo* have observed that "the ultimate determination of the issue will have a far reaching effect on litigation involving alleged Title VII discrimination in federal employment." *Hackley* v. *Johnson*, 360 F. Supp. 1247, 1249 (D.D.C. 1973); *Handy* v. *Gayler*, 364 F. Supp. 676 (D. Md. 1973).

The practical import of this issue is simple—in the absence of a trial *de novo* a federal employee, no matter how

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tinguishing *McDonnell-Douglas*); *Abrams* v. *Johnson*, 7 EPD ¶ 9380, p. 7712 (N.D. Ohio 1974). *Compare Carreathers* v. *Alexander* at 7 EPD ¶ 9379, p. 7709 (relying on *Alexander* and *McDonnell-Douglas* as requiring a trial *de novo*) *with* 9 EPD ¶ 8958, reversing its earlier decision and rejecting *de novo*) (D. Colo. 1974).

[44] Since the first *de novo* decision on June 6, 1973, *Thompson* v. *United States Department of Justice*, 360 F.Supp. 255, vacated 372 F.Supp. 762 (N.D. Cal. 1974).

[45] *Hackley* v. *Johnson*, D.C. Cir. No. 73-2072; *Laurel* v. *United States*, 5th Cir. No. 74-3746; *Swain* v. *Callaway*, 5th Cir., No. 75-2002; *Eastland* v. *Tennessee Valley Authority*, 5th Cir., No. 75-1855; *Caro* v. *Schultz*, 7th Cir. No. 74-1728.

egregiously his or her rights have been violated, is virtually certain to lose. Since 1973 there have been 28 district court decisions on the merits by courts affording less than a *de novo* trial. These decisions involved a wide variety of complaints, discrimination on the basis of race, sex, national origin and religion, a multitude of defendant agencies, and administrative records of varying length and complexity. *In each and every case the district court refused to overturn the administrative decision and granted summary judgment in favor of the defenaants.*[46] In many of these cases the district court's decision is utterly devoid of any discussion of the facts of the case or of what evidence allegedly supports the administrative decision.[47]

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[46] *Salone* v. *United States*, 7 EPD ¶ 9376 (W.D. Okla. 1974); *Sperling* v. *United States*, 7 EPD ¶ 9274 (D.N.J. 1974); *Chandler* v. *Johnson*, 7 EPD ¶ 9139 (C.D. Cal. 1973); *Nimitz* v. *Berzak*, 7 EPD ¶ 9273 (E.D. La. 1974); *Hackley* v. *Johnson*, 360 F.Supp. 1247 (D.D.C. 1973); *Gautier* v. *Weinberger*, 6 EPD ¶ 9001 (D.D.C. 1973); *Tomlin* v. *Air Force Medical Center*, 369 F.Supp. 353 (S.D. Ohio 1974); *Thompson* v. *Department of Justice*, 372 F.Supp. 762 (N.D. Cal. 1974); *Bernardi* v. *Butz*, 7 EPD ¶ 9381 (N.D. Cal. 1974); *Johnson* v. *U.S. Postal Service*, 364 F.Supp. 37 (N.D. Fla. 1973); *Coopersmith* v. *Johnson*, 7 EPD ¶ 9388 (D.D.C. 1974); *Roney* v. *Saxbe*, 8 EPD ¶ 9587 (D.D.C. 1974); *Thomas* v. *Department of State*, 8 EPD ¶ 9622 (D.D.C. 1974); *Roberts* v. *Mumford*, 8 EPD ¶ 9692 (D.D.C. 1974); *Cates* v. *Johnson*, 377 F.Supp. 1145 (W.D. Pa. 1974); *Wormley* v. *Department of the Navy*, 8 FEP Cas. 1008 (N.D. Cal. 1974); *Leinster* v. *Engman*, 8 EPD ¶ 9774 (D.D.C. 1974); *McGowan* v. *United States Information Agency*, 8 EPD ¶ 9787 (D.D.C. 1974); *Allen* v. *Veterans Administration*, 8 EPD ¶ 9783 (W.D. Pa. 1974); *Caro* v. *Schultz*, 9 EPD ¶ 9987 (N.D. Ill. 1975); *Smith* v. *Gunther*, 9 EPD ¶ 9915 (D.D.C. 1975); *Marshall* v. *United States Federal Highway Administrator*, 7 EPD ¶ 9184 (D.D.C. 1973); *Smith* v. *Snyder*, 381 F.Supp. 1083 (E.D. Pa. 1974); *Ettinger* v. *Johnson*, 10 FEP Cas. 642 (E.D. Pa. 1974); *Fisher* v. *Brennan*, 10 FEP Cas. 685 (E.D. Tenn. 1974); *Haire* v. *Callaway*, 9 FEP Cas. 168 (E.D. No. 1974); *Russell* v. *Johnson*, 10 FEP Cas. 924 (W.D. Pa. 1975); *Richerson* v. *Fargo*, 10 FEP Cas. 862 (E.D. Pa. 1975).

[47] See e.g. *Nimitz* v. *Berzak*, 7 EPD ¶ 9273 (E.D. La. 1974); *Chandler* v. *Johnson*, 7 EPD ¶ 9139 (C.D. Cal. 1973); *Gautier*

The instant case well illustrates the cursory treatment given section 717 cases in the absence of a *McDonnell-Douglas* trial *de novo*. The district court's analysis of the 500 page administrative record was limited to two sentences.[48] The court's summary of the facts of the case was taken, almost *verbatim*, from the government's motion for summary judgment. A comparison of the District Court's decision with the administrative record raises serious question as to whether the court had actually read the record.[49] The District Court's decision is typical of the

v. *Weinberger*, 6 EPD ¶ 9001 (D.D.C. 1973); *Thompson* v. *United States Department of Justice*, 372 F.Supp. 762 (N.D. Cal. 1974); *Roney* v. *Saxbe*, 8 EPD ¶ 9587 (D.D.C. 1974); *Wormley* v. *Department of the Navy*, 8 FEP Cas. 1008 (N.D. Cal. 1974).

[48] P. 6a. The first sentence stated that the affidavits of petitioner's supervisors denying the existence of discrimination "stand uncontroverted in the Record." In fact the record contained sworn statements of petitioner's fellow workers, both black and white, describing in detail the discrimination they had observed. Twelve affiants swore that Salone had been discriminated against because of his race, nine affiants stated that Salone had been discriminated against in retaliation for having filed discrimination complaints in the past, and eight swore that Salone had been afforded less opportunity to receive job training than had whites. Appeals Examiner's Report, p. 10.

The second statement was that the Complaint Examiner had rejected petitioner's objection to his March 1972 performance appraisal because that appraisal was so high. The District Court made no mention of the Examiner's finding that the defendants had engaged in systematic discrimination against plaintiff because he had filed a complaint of racial discrimination in 1967.

In the Tenth Circuit the government characterized this two sentence analysis as "exhaustive." Brief of Defendants-Appellees, p. 5.

[49] Although the decision states that the district court had read the Record "most carefully," p. 6a, the court never noticed that the 350 page transcript of the "fair hearing", the critical portion of the administrative record by which the agency's decision must be measured, had been omitted from the record filed with and read by the court. The district court further recites that "On April 2, 1973, the Plaintiff appealed the Director's decision to

peremptory treatment afforded section 717 complaints in the absence of a trial *de novo*; Congress adopted section 717, not to encourage the performance of such empty rituals, but to mandate judicial inquiry into claims of racial discrimination.

The treatment of cases under the *de novo* standard is strikingly different. The courts have there afforded plaintiffs, through discovery and hearings in open court, ample opportunity to develop the relevant facts. The resulting decisions include detailed discussion of the evidence and specific findings as to disputed facts. Plaintiffs have won somewhat more than half of these cases on the merits.[50] This result suggests that, in many of the 28 cases denying *de novo* trials, the courts did not find discrimination, not because it had not occurred, but because they refused to look for it. Certiorari should be granted to determine whether the federal district courts which examine with scrupulous care claims of discrimination in private employment can or must refuse to do so when the alleged lawbreaker is the government of the United States.

The availability of *de novo* trials may also effect whether federal employees can maintain class actions. The lower

the Board of Appeals and Review, Civil Service Commission which Board, on July 30, 1973, affirmed the decision of the Director, EEO, without comment." That sentence, taken from the government's motion for summary judgment, is inaccurate—the Board's decision was accompanied by an eight page opinion.

[50] *Reynolds* v. *Wise*, 8 EPD ¶¶ 9777 (N.D. Tex. 1973), 9778 (N.D. Tex. 1974) (plaintiff won); *Robinson* v. *Warner*, 8 EPD ¶ 9452 (D.D.C. 1974) (court, though denying *de novo* trials generally, gave one in this case; plaintiff won); *McLaughlin* v. *Callaway*, 9 EPD ¶¶ 9888, 10,098 (S.D. Ala. 1974) (court, though denying *de novo* trials generally, gave one in this case; plaintiff won); *Levens* v. *General Services Administration*, 10 FEP Cas. 493 (W.D. Mo. 1975) (government won); *Harris* v. *Ulanich*, No. 73-369-N, E.D. Va., opinion dated November 14, 1974 (government won).

courts denying trials *de novo* have uniformly held that, if federal employees are entitled only to judicial review of their administrative proceeding, federal employees can never maintain a class action against the federal government.[51] These courts would bar class actions even where the employee sues after the agency fails to act for 180 days, and there is thus not even an administrative decision to affirm. Although some courts denying class actions against the federal government suggest the rule might be otherwise if there was an administrative record regarding class wide discrimination,[52] Civil Service Commission procedures make it impossible to make such a record.[53] Thus the bar

[51] *Eastland* v. *Tennessee Valley Authority*, 9 EPD ¶ 9927 (N.D. Ala. 1975); *Ficklin* v. *Sabatini*, 9 EPD ¶ 9829 (E.D. Pa. 1974); *Handy* v. *Gayler*, 364 F. Supp. 676, 679 (D. Md. 1973); *McLaughlin* v. *Callaway*, 9 EPD ¶ 9888 (S.D. Ala. 1974); *Pendleton* v. *Schlesinger*, 8 EPD ¶ 9598 (D.D.C. 1974); *Pointer* v. *Sampson*, 7 EPD ¶ 9326, p. 7506 (D.D.C. 1974); *Richerson* v. *Fargo*, 8 EPD ¶ 9751, p. 6135 (E.D. Pa. 1974); *Williams* v. *Mumford*, 6 EPD ¶8785 (D.D.C. 1973); cf. *Caro* v. *Schultz*, 9 EPD ¶ 9987 (N.D. Ill. 1975); *Evans* v. *Johnson*, 7 EPD ¶ 9351 (C.D. Cal. 1974); *Hackley* v. *Johnson*, 360 F. Supp. 1247, 1254, n. 11 (D.D.C. 1973).

[52] See, *e.g.*, *Richerson* v. *Fargo*, 9 EPD ¶ 9751, p. 6135 (E.D. Pa. 1974).

[53] Under the Commission's regulations all class allegations must be treated under a special provision for "third party complaints". 5 CFR § 713.251. Such third party complaints are not subject to the procedures for individual complaints: there is no hearing, no detailed written decision, and no opportunity to cross examine witnesses. It appears to be the Commission's position that if such a complainant is denied relief he or she cannot seek judicial redress.

The Appeals Review Board has consistently held that an employee cannot include with his individual complaint allegations of class-wide discrimination, but must process such allegations under the third party procedure. See, *e.g.*, ARB Decision Nos. 713-74-483; 713-74-577. If a hearing examiner finds there is class discrimination, he cannot grant relief. ARB Decisions No. 73-288, 713-74-192. The Civil Service Commission has instructed those examiners, "In some instances, only one person out of a similarly situated group of employees files a complaint of discrimination. If the Examiner finds discrimination in such a case, any specific corrective action, for example, promotion, may be recommended only for the complainant." United States Civil Service Commission, *Discrimination Complaints Examiners Handbook*, 73-74 (April, 1973).

One district court has held, at the urging of the government, that "*Administrative* proceedings under Title VII are individual in nature and therefore not susceptible to class treatment," *Archuleta* v. *Callaway*, No. 74-M-213, D. Colo., decision dated November 24, 1974, slip opinion, p. 8.

to *de novo* trials may mean that the federal government, the nation's largest employer with over 3 million employees, would be immune from the class actions available against all other employers which engage in discrimination. Compare *Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968).[54] For the courts to restrict themselves to dealing with individual cases, rather than systematic discrimination that may affect thousands of minority workers, would be to unilaterally renounce the obligation conferred on them by Congress to end such systematic discrimination "root and branch."

Thus if the construction of section 717 heretofore advanced by the United States, and adopted by the Tenth Circuit, is accepted, the statute will be rendered totally ineffective as a remedy for discrimination in federal employment. Certiorari should be granted to resolve the widespread conflict on this vital issue.

[54] The conflict on the *de novo* issue has, of course, led to a similar conflict as to whether federal employees can ever maintain class actions. *Compare* cases cited, n. 51, *supra, with Chisholm* v. *United States Postal Service*, No. C-C-73-148, W.D. N.C., opinion dated May 29, 1975; *Sylvester* v. *United States Postal Service*, No. 73-H-220, S.D. Tex., opinion dated April 23, 1975.

III.

The Decision of the Tenth Circuit Is Clearly Erroneous.

This Court's decision in *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), requires a trial *de novo* in a Title VII action by an employee working for a private employer. The right to a trial *de novo* in private employment discrimination cases was already well established when Congress adopted amended Title VII to cover federal employees in 1972.[55] The issue presented by this case is whether Congress intended to restrict federal employees to a judicial remedy less effective than that afforded private employees.

The legislative history of Section 717 clearly demonstrates that the underlying purpose of that amendment was to give federal employees the same right of action already enjoyed by private employees under *McDonnell-Douglas* v. *Green*, and to end the distinction between the two which had existed since 1964. As the House Committee explained, section 717 was drafted because "federal employees, unlike those in the private sector to whom Title VII is applicable, face legal obstacles in obtaining meaningful remedies." [56] Under Section 717, the Senate report stated, "Aggrieved employees or applicants will also have *the full rights* available in the courts as one granted to individuals in the private sector under Title VII." [57] Senator Dominick,

[55] *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 800 (4th Cir. 1971), *cert. dismissed* 404 U.S. 1006 (1971); *Beverly* v. *Lone Star Lead Construction Corp.*, 437 F.2d 1136, 1140-42 (5th Cir. 1971); *Flowers* v. *Local 6, Laborers International Union of North America*, 431 F.2d 205, 206-08 (7th Cir. 1970); *Fekete* v. *United States Steel Corp.*, 424 F.2d 331, 334-36 (3d Cir. 1970).

[56] H. R. Rep. No. 92-238, p. 25.

[57] S. Rep. No. 92-415, pp. 16-17 (emphasis added).

one of the draftsmen of the Senate version of § 717(c), argued

> A federal employee . . . would . . . have a right . . . to go into court himself in order to get a solution to his problem . . . It seems to me that where we are dealing with job discrimination, it makes no difference what type of job you have, you should be entitled to the *same* remedies anyone else has, and this is a right to have the federal court determine whether or not you have been discriminated against.[58]

Senator Williams, the floor manager of § 2515, agreed.

> Previously, there have been unrealistically high barriers, which prevented or discouraged a federal employee from taking a case to court. This will no longer be the case. There is no reason why a federal employee should not have the *same* private right of action enjoyed by individuals in the private sector, and I believe that the committee has acted wisely in this regard.[59]

It was in this context that Senator Cranston, the other draftsman of § 717(c), explained, "As with other cases brought under Title VII of the Civil Rights Act of 1964, Federal District Court review would not be based on the agency and/or CSC record and would be a trial *de novo*." [60]

Legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. *Alexander* v. *Gardner-Denver*, 415 U.S. 36 (1974); *Johnson* v. *Railway Express Agency*, 43 U.S.L.W. 4583 (1975). Congress has fashioned for federal

[58] 118 Cong. Rec. 3967 (emphasis added).

[59] 118 Cong. Rec. 4922 (emphasis added).

[60] 118 Cong. Rec. 4929 (1972).

employees just such an array of independent remedies.[61] The administrative complaint procedure is one of several such independent remedies; it affords the defendant agency an opportunity to learn, through an informal process, the nature of the claim and to settle the case before court action is commenced under section 717.[62] But for federal complaints of employment discrimination, as for all others, "Congress intended Federal courts to exercise final responsibility for enforcement of Title VII." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 56 (1974). That responsibility requires, whether the complaining employee works for the federal government or private industry, that the courts make an independent determination as to the existence of discrimination and do so on the basis of all available evidence, not merely that which may have come to light in an earlier proceeding as part of a non-judicial remedy. The courts cannot shirk that responsibility out of "deference" to an arbitrator, administrative proceeding, or E.E.O.C. determination, or from a simple desire to avoid the work involved. "Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 60, n. 21 (1974).

Alexander rejected any "deference" to arbitration decisions because the arbitration process "is not equivalent to judicial fact finding." 415 U.S. at 57. The administrative

[61] See e.g. 42 U.S.C. § 1981; 5 U.S.C. § 706; 28 U.S.C. §§ 1331, 1343(4), 1346, 1361.

[62] Whether this failure of the Civil Service Commission to create a meaningful and fair fact-finding and adjudicatory process violates section 717(b) is a question not presented by this case.

complaint process is equally inadequate to serve as a substitute for judicial resolution of the discrimination claim. As this Court noted in *Morton* v. *Mancari*, 41 L.Ed.2d 290, 298 (1974), Congress authorized civil litigation under section 717 precisely because the complaint process "had proved ineffective for the most part," and "had impeded rather than advanced the goal of the elimination of discrimination in Federal employment."[63] The defects in the existing complaints process are legion. (1) Most of the rights and procedures of civil trials, particularly discovery and compulsory process, are not available to the employee, and the rules of evidence are not adhered to. Compare *Alexander* v. *Gardner-Denver Co.*, 415 U.S. at 57-58. (2) The decisions of the agencies and the Appeals Review

[63] H. Rep. No. 92-238, pp. 23-24, stated:

> A critical defect of the Federal equal employment program has been the failure of the complaint-process. That process has impeded rather than advanced the goal of the elimination of discrimination in Federal employment. The defect, which existed under the old complaint procedure, was not corrected by the new complaint process. The new procedure, intended to provide for the informal resolution of complaints, has, in practice, denied employees adequate opportunity for impartial investigation and resolution of complaints.
>
> Under the revised procedure, effective July 1, 1969, the agency is still responsible for investigating and judging itself. Although the procedure provides for the appointment of a hearing examiner from an outside agency, the examiner does not have the authority to conduct an independent investigation. Further, the conclusions and findings of the examiner are in the nature of recommendations to the agency head who makes the final agency determination as to whether discrimination exists. Although the complaint procedure provides for an appeal to the Board of Appeals and Review in the Civil Service Commission, the record shows that the Board rarely reverses the agency decision.
>
> The system, which permits the Civil Service Commission to sit in judgment over its own practices and procedures which themselves may raise questions of systemic discrimination, creates a built-in conflict-of-interest.

See also, S. Rep. No. 92-415, p. 14.

Board do not purport to follow or even consider judicial constructions of Title VII, but proceed in an *ad hoc* manner emphasizing compliance with established Civil Service procedures rather than federal civil rights laws. See *id.*, pp. 56-57. (3) The primary responsibility for judging a claim of discrimination is left in the hands of the same agency accused of breaking the law, a practice expressly condemned by Congress which strips those decisions of any credibility. See *Morton* v. *Mancari*, 41 L.Ed.2d 290, 299 (1974). Thus in the instant case the outside investigator and Appeals Examiner found discrimination, but their decisions were subject to review by the base commander and the Secretary of the Air Force, respectively, who both reversed that finding and ruled in favor of their agency.[64] (4) Neither the Commission or any other personnel involved in the complaint process have significant expertise in problems of employment discrimination. Many of the key personnel are not attorneys and virtually none have prior experience with the federal agencies such as the Commission on Civil Rights, the Civil Rights Division, or E.E.O.C.[65]

Had Congress intended to preclude trials *de novo*, and to limit the district courts to determining whether the agency decision was supported by substantial evidence, it would have said so explicitly. In the past Congress has made known its desire to impose such limitations and expressly stated the standard it wished to establish.[66] Section

[64] See pp. 4, 7, *supra*.

[65] Both the House and Senate Reports noted that the Commission "has been plagued by a general lack of expertise in recognizing and isolating the various forms of discrimination within the system" H. R. Rep. No. 92-238, p. 24; S. Rep. No. 92-415, p. 15.

[66] See e.g., 5 U.S.C. § 706(2)(E) ("substantial evidence" test); 15 U.S.C. § 45 (findings to be upheld "if supported by evidence"); 15 U.S.C. § 21(c) ("substantial evidence" test); 15 U.S.C. § 522 (facts found by agency "prima facie evidence" of those facts); 29 U.S.C. § 160(e) ("substantial evidence"); 49 U.S.C. § 16(2) (findings of commission "prima facie" evidence of facts stated therein); 21 U.S.C. § 371(f)(4) ("substantial evidence"); 21 U.S.C. § 348(g)(2) (findings to be sustained "if based upon a fair evaluation of the entire record"); 12 U.S.C. § 1848 ("substantial evidence").

717 was proposed as part of a bill which had just such limitations in its other provisions. The original House and Senate bills, as reported out of committee, would have authorized the E.E.O.C. to issue cease and desist orders. Both bills expressly limited court review of those orders, providing that

> The findings of the Commission with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. H. R. 1746, 92nd Cong., 706(k); S. 2515, § 706(k), 91st Cong., 1st Sess.

This limitation in § 706(k) was debated at length in both houses, and the Senate considered and rejected a proposal to adopt a broader "preponderance of the evidence" standard.[67] The substantial evidence provision was opposed because of fear that the Commission would not be impartial, and that virtually any decision could meet that test,[68] and

[67] 117 Cong. Rec. 31969; 118 Cong. Rec. 1657-1661, 3966 (1972).

[68] 118 Cong. Rec. 1659 (Remarks of Senator Ervin) ("While the law as amended requires the findings of the Commission to be made by a preponderance of the evidence, that would be paying little more lip service to justice than the bill now before us. It would be absolutely nugatory because if the Commission did not obey that law and based its findings on less than a preponderance of the evidence, when the court reviewed the action of the Commission it could not determine that the Commission had failed to obey the law if the findings of the Commission was supported by any substantial evidence—that is, anything above a scintilla, and anything constituting enough to resist a motion for a nonsuit in a civil court.")

this provision contributed significantly to Congress' decision not to give E.E.O.C. cease and desist powers. When the draftsmen of the House and Senate bills wrote a "substantial evidence" rule into § 706(k) but not into § 717(c), it can only have been because they intended the "civil action" under § 717(c) to be the same full trial *de novo* accorded to private employees. Even if Congress had expressly made administrative proceedings the exclusive remedy and designated the Commission as solely responsible for enforcing Title VII, an aggrieved employee would still have been entitled to challenge the Commission or agency decisions as arbitrary and capricious. *Dunlop* v. *Bachowski*, 43 U.S.L.W. 4669 (1975). In authorizing such employees to bring a "civil action" Congress clearly contemplated, not the limited review which already existed without section 717, but the same plenary hearing accorded private employees. Cf. *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 n. 4 (1968).

The use of the "substantial evidence" rule to thwart class actions against the federal government is also contrary to the clear intent of Congress. The government has heretofore argued that judicial relief under section 717 cannot be afforded to all similarly situated victims of discrimination, but only to employees who have filed and processed administrative complaints. That is precisely the limitation considered and rejected by Congress in 1972.[69] The Senate Report recommending against any such limitation stated, "The Committee agrees with the courts that Title VII actions are by their very nature class complaints, and that

[69] The Erlenborn bill, H. R. 6760, and the Dominick bill, S. 2617, both would have forbidden the courts to grant relief to an individual who "neither filed a charge nor was named in a charge or amendment thereto." The House passed the Erlenborn bill, but the Senate rejected this provision, and in conference the House receded. 118 Cong. Rec. 7168, 7565 (1972).

any restrictions on such actions would greatly undermine the effectiveness of Title VII."[70] Both the House and Senate Committees criticized the Civil Service Commission for failure to perceive the class nature of discrimination.[71] To the extent that denial of a trial *de novo* precludes class actions, that denial is inconsistent with Congress' clearly expressed desire to sanction class actions against all forms of employment discrimination.

At issue in this case is whether, unlike all other private, state, and local employees, federal workers will be deprived of the most, if not the only, effective remedy against discrimination—a plenary judicial consideration of their case. The simple fact is that the administrative complaint process has been a failure. In fiscal 1974 3,435 formal complaints of discrimination were filed by federal employees, in addition to over 28,000 informal complaints.

[70] S. Rep. 415, p. 27, 92nd Cong., 1st Sess. (1971). Senator Williams argued:

> The courts have been particularly cognizant of the fact that claims under Title VII involve the vindication of a major public interest, and that any action under the Act involves considerations beyond those raised by the individual claimant. As a consequence, the leading cases in this area to date have recognized that Title VII claims are necessarily class complaints and that, accordingly, it is not necessary that each individual entitled to relief under the claim be named in the original charge or in the claim for relief. 118 Cong. Rec. 4942 (1972).

Congresswoman Abzug noted that

> [t]he structure and pattern of employment discrimination will remain untouched unless large numbers of workers are affected. An award in favor of one complainant will do little to discourage an employer bent on discriminating against a class of employees, but an award—or even the possibility of an award—on behalf of an entire class can effectively discourage this kind of unlawful discrimination. 117 Cong. Rec. 32097 (1971).

[71] H. R. Rep. No. 92-238, pp. 24-25 (1971); Sen. Rep. No. 92-415, p. 14 (1971).

The agencies and Civil Service Commission found discrimination in only 170 cases, and in most of those cases refused to award either back pay or a promotion.[72] It is, as a practical matter, virtually impossible for a Federal employee to win meaningful relief through the administrative process. The decision of the Tenth Circuit, limiting section 717 actions to "judicial review," makes it equally impossible for such an employee to win relief in the courts. Experience has already clearly demonstrated that, in the absence of a *McDonnell-Douglas* trial *de novo*, the government is assured of victory in any section 717 case regardless of whether the defendant agency is guilty of discrimination.[73] Such an emasculation of section 717 would be clearly inconsistent with the intent of Congress and with the statutory and constitutional commitment to preventing discrimination in federal employment.

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[72] Memorandum of Anthony Hudson to Irving Kator, Precomplaint Counseling and Discrimination Complaint Activity During Fiscal Year 1974.

[73] See p. 19, *supra*.

CONCLUSION

For the above reasons a Writ of Certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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APPENDIX

Opinion of United States District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

No. CIV-73-591-E

ANTHONY M. SALONE, JR.,

Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

April 30, 1974

EUBANKS, D.J.:

The Plaintiff is an employee of OCAMA at Tinker Air Force Base, Oklahoma City, Oklahoma. On April 11, 1972 he complained in writing to the Commander, Tinker Air Force Base, that his supervisors were engaging in reprisals against him because he had filed an earlier complaint of discrimination, and alleged that the reprisals had continued over a period of five years. More specifically he complained that the alleged reprisals consisted of appraisals which made it impossible for him to achieve promotion and that he had been frustrated by his supervisors in his efforts to gain a broader experience in order to qualify for promotion.

The Commander forwarded the complaint to the agency's Chief EEO Counselor who, following interviews with the Plaintiff and witnesses, filed a report wherein he found that management had not clearly refuted the allegations

of the Plaintiff and recommended that criteria for measuring the Plaintiff's performance be established and that the Plaintiff be alerted to these criteria and how they could be met. The record is silent on the action taken, if any, on the recommendations of the EEO Counselor.

On June 28, 1972 Plaintiff filed a formal written complaint alleging racial discrimination. An investigation, extending over a period of forty days, was made by investigators from Kelly Air Force Base, Texas. Their Report found that the Research and Reconciliation Unit, in which Plaintiff is employed, "is a fertile place for complaints unless management is made aware of this condition and efforts are not initiated to correct the situation, there will be more complaints generating from this organization." The Report did not specifically find discrimination, but rather "favoritism" and did not directly answer many of the Plaintiff's allegations.

The Plaintiff was advised by the Commander, OCAMA, on November 10, 1972 that he found no evidence of racial discrimination, but that he had instituted certain management-administrative improvements which he felt were required based on his determination that several employees were "treated as the Plaintiff was."

Thereupon and on November 16, 1972 the Plaintiff requested a hearing before an Appeals Examiner from another agency. The request was honored and a hearing was held on January 8 and 9, 1973. The Hearing Examiner found that "the evidence . . . does not indicate to me an environment of discrimination against blacks, but rather a picture of discrimination directed at one individual—Mr. Salone. . . . There is abundant evidence that the quality of supervision in the Research and Reconciliation Unit [in which Plaintiff is employed] is highly questionable. . . . [Plaintiff's supervisor] "has given preferential treatment to certain favored employees, although not on the basis of race or color. . . . There is every likelihood that Mrs. Massie [Plaintiff's supervisor] has consciously denied Mr. Salone the opportunity to perform duties . . . the performance of which he feels would enhance his chances to appear on profile. I cannot agree, however, that his performance of these duties would enhance his promotional chances. . . . My conclusion is that there is no evidence that Mr. Salone has been discriminated against in connection with his most recent supervisory appraisal. His concern that he was disadvantaged by appraisal, particularly in the area of quality and quantity of work, is not supported. . . ."

The Examiner made seven recommendations, of which numbers one, two, three and five were addressed to the fixing of responsibility and corrective action for the discrimination. The Director of Equal Employment Opportunity, Office of the Secretary of the Air Force, notified the Plaintiff on March 9, 1973 that the Record did not support his allegations of racial discrimination and recommendations numbered one, two, three and five of the Examiner's Report were rejected by the Director's findings. Thereafter and on April 2, 1973 the Plaintiff appealed the Director's decision to the Board of Appeals and Review, Civil Service Commission which Board, on July 30, 1973, affirmed the decision of the Director, EEO, without comment. Thereafter and on June 28, 1973 this action was instituted, seeking a trial de novo. The Defendants have moved to dismiss for summary judgment.

The Complaint names as Party Defendants the individual members of the United States Civil Service Commission and three individuals who served in supervisory

positions in Plaintiff's unit as Tinker AFB relying on 42 U.S.C.A. §§ 2000e-5 and 2000e-16. Section 2000e-16(a) expressly provides that "all personnel actions affecting employees . . . in military departments . . . shall be free from any discrimination based on race, color, religion, sex or national origin." Section 2000e-16(b) expressly provides, with exceptions not pertinent here, that "the Civil Service Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies; and 2000e-16(c) provides that within thirty days of receipt of notice of final action taken by the Civil Service Commission upon an appeal from a decision of a governmental agency on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, "an employee . . . if aggrieved by the final disposition of his complaint . . . may file a civil action as provided in 2000e-5 of this title, in which civil action the head of the department, agency or unit, as appropriate, shall be the defendant." Thus it clearly appears that the individual members of the Civil Service Commission and the Plaintiff's supervisors are not proper Party Defendants.

The courts have no general supervisory power over the acts of officials involving the exercise of judgment in the executive department of the government. See *Rosenman* v. *Levbarg*, CA 3, 1970, [3 EPD §8069] 435 F.2d 1286, in which Senior Circuit Judge Murrah of the Court of Appeals, Tenth Circuit, sat by designation. The Court there said:

"Only well-founded claims of discrimination in federal employment because of race, color, religion, sex or national origin, see 42 U.S.C. Sections 2000e-2 and 2000e-5; or union activity, see Executive Order 11491, are cognizable

in the courts. And then only to determine whether administrative due process has been accorded to the alleged discriminatee, i.e. whether a fair and open hearing with the right of confrontation and cross-examination was accorded on the discriminatory charges."

The law in the case at hand was settled in a well-reasoned opinion in *Hackley* v. *Johnson, et al.*, D.C. Dist. Col., 1973, [6 EPD ¶8725] 360 F.Supp. 1247, wherein federal government employees claimed discrimination on the basis of race in the employment opportunities afforded to them by the Government and wherein the Court sustained the Defendants' motions for summary judgment. The Court held that the Equal Employment Opportunity Act, 42 U.S.C.A. 2000e-16 on which the Plaintiffs there, as well as the Plaintiff herein, relied, does not require that one who is dissatisfied with the outcome of administrative hearings and who seeks to vindicate his claim of racial discrimination, be granted a trial de novo. A reading of the opinion is commended to counsel. Important here is that the Court held that:

"The District Court is required by the Act to examine the administrative record with utmost care. If it determines that an absence of discrimination is affirmatively established by the clear weight of the evidence in the record, no new trial is required." p. 1252.

The Court is not required, therefore, to reweigh the evidence or to make an independent determination of the facts. The finding of the Secretary of the Air Force is not to be disturbed merely because the evidence is conflicting. His finding is against the "clear weight of the evidence" only if a conclusion opposite to his determination is clearly evident. *Kelly* v. *Civil Service Commission*, Ill., 1953, 175 N.E.2d 630.

The Court has examined the Record herein most carefully. It discloses that Plaintiff was afforded a fair hearing with the right of confrontation and cross-examination. The Complaint alleges that the Defendants "have caused this Plaintiff great damage by the use of a grading system which has continuously and systematically, since the aforesaid date [1966] caused this Plaintiff to be underrated." It further alleges "that the low rating of this Plaintiff was brought about by racial prejudice and by reprisal upon the part of the Defendants, and each of them, in response to an earlier complaint filed by this Plaintiff against these Defendants." The general allegation is that "the natural and proximate result of this grading system has caused this Plaintiff to forego promotions and upgrades in pay" which he would otherwise have received.

Absence of the alleged discrimination is affirmatively established by the clear weight of the evidence in the record. The affidavits of the three supervisory personnel defendants deny the allegations of the Complaint. These affidavits stand uncontroverted in the Record. Moreover, the Report of EEO Complaint Examiner concluded that:

". . . there is no evidence that Mr. Salone has been discriminated against in connection with his most recent supervisory appraisal. His concern that he was disadvantaged by appraisal, particularly in the areas of quality and quantity of work, is not supported, in view that of the fact that he received the maximum score on the quality and quantity factors."

The Record and pleadings are almost 500 pages in length. They have been reviewed with utmost care. They clearly and affirmatively show an absence of the alleged discrimination against the Plaintiff. Accordingly,

It Is Ordered, That Defendants' Motion for Summary Judgment affirming the decision of the Board of Appeals and Review, United States Civil Service Commission, affirming the decision of the Secretary of the Department of the Air Force, be and the same is hereby sustained.

Counsel for Defendants will prepare an appropriate Order for approval and filing herein.

The Clerk of the Court is directed to mail a copy hereof to counsel of record.

Opinion of United States Court of Appeals for the Tenth Circuit

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1475

ANTHONY M. SALONE, JR.,

Appellant,

v.

UNITED STATES OF AMERICA, *et al.*,

Appellees.

Feb. 21, 1975

Robert B. Smith, of Miskovsky, Sullivan & Miskovsky, Oklahoma City, Okl., for appellant.

William R. Burkett, U. S. Atty., and John E. Green, Asst. U. S. Atty., for appellees.

Before LEWIS, Chief Judge, and SETH and McWILLIAMS, Circuit Judges.

SETH, Circuit Judge.

Appellant Salone is a civilian employee at the Oklahoma City Air Materiel Area (OCAMA), Tinker Air Force Base, Oklahoma. In April 1972, Salone complained to the Commander of Tinker AFB that his supervisors were discriminating against him because of his race, and in reprisal for a discrimination complaint filed by him some five years previously. This complaint was referred to the

agency's Chief EEO Counselor who interviewed Salone and the witnesses and made recommendations. Further complaints, hearings, and recommendations followed, and in March 1973 Salone was notified by the Director of Equal Employment Opportunity, Office of the Secretary of the Air Force, that his allegations of racial discrimination were not supported by the record. The decision of the Director was affirmed without comment by the Civil Service Commission Board of Appeals and Review.

Having exhausted his administrative remedies through the Civil Service machinery, Salone filed this action in the District Court pursuant to 42 U.S.C. §§ 2000e-16 and 2000e-5. He requested a trial de novo on his allegations of discrimination, rather than a review of the administrative record. Defendant filed a motion for summary judgment and asking that the action be dismissed for lack of subject matter jurisdiction.

The trial judge found that review of the administrative record was the procedure required, and that the record showed an absence of discrimination. He then granted the motion for summary judgment, and further found an absence of subject matter jurisdiction.

The only issue presented on this appeal is whether a federal employee filing a civil action under 42 U.S.C. § 2000e-16 is entitled to a trial de novo or judicial review of the administrative record. The statute is silent on this question. 42 U.S.C. § 2000e-16(c) provides that a federal employee who has a complaint of discrimination based on race, color, religion, or sex may, within certain time limits, "file a civil action as provided in section 2000e-5 of this title." Section 2000e-5 governs civil actions by private employees. 42 U.S.C. § 2000e-16(d) reads: "The

provisions of section 2000e-(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder."

There is no dispute that a private employee filing an action pursuant to 42 U.S.C. §§ 2000e-5(f) through (k) is entitled to a trial de novo. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668. Two early cases applied this holding to actions under 42 U.S.C. § 2000e-16(c) and concluded that the 1972 amendment to the Equal Employment Opportunity Act was intended to extend to federal employees the same procedure that was available to private employees, and thus a federal employee should be entitled to a trial de novo rather than judicial review of the administrative record. Henderson v. Defense Contract Administration Services Region, New York, 370 F.Supp. 180 (S.D. N.Y.); Thompson v. United States Dep't of Justice, Bureau of Narcotics & Dangerous Drugs, 360 F.Supp. 255 (N.D. Cal.).

A separate line of cases also developed which maintained a distinction between private and federal employees. These cases relied on decisions concerning discharge of federal employees. In such actions, brought under 5 U.S.C. § 701 et seq., a federal employee is entitled only to review by the federal district court of the administrative record. Trials de novo are not provided. Polcover v. Secretary of Treasury, 477 F.2d 1223 (D.C. Cir.), cert. denied, 414 U.S. 1001, 94 S.Ct. 356, 38 L.Ed.2d 237; Rosenman v. Levbarg, 435 F.2d 1286 (3d Cir.); Dabney v. Freeman, 358 F.2d 533 (D.C. Cir.); Gordon v. Bright, 306 F.Supp. 252 (W.D. Okla.), aff'd 419 F.2d 835, cert. denied, 397 U.S. 1057, 90 S.Ct. 1403, 25 L.Ed.2d 674.

In Hackley v. Johnson, 360 F.Supp. 1247 (D.D.C.), the court considered the question whether a federal employee

is entitled to a trial de novo after being unsuccessful in administrative agency proceedings on a complaint of employment discrimination. The court considered the history of the 1972 Equal Employment Opportunity Act, the potential burden on the federal judiciary, duplication of the administrative process, prior federal employee discharge cases, and the need for prompt, consistent decisions in discrimination matters, and said: "Viewing the Act and its history broadly, Congress intended to guarantee *access* to the courts—'a civil action'—to eliminate previous barriers but not to start the process anew." Thus the court concluded that the Act provided for "access" but once there a trial de novo was not required under 42 U.S.C. § 2000e-16.

The holding in *Hackley* was followed in Tomlin v. United States Air Force Medical Center, 369 F.Supp. 353 (S.D. Ohio), and Handy v. Gayler, 364 F.Supp. 676 (D.Md.). The district court for the Northern District of California, relying on *Hackley* and *Handy*, reversed its earlier decision in Thompson v. United States Dep't of Justice, Bureau of Narcotics & Dangerous Drugs, *supra*, and held that a trial de novo was not required under 42 U.S.C. § 2000e-16. Thompson v. United States Dep't of Justice, Bureau of Narcotics & Dangerous Drugs, 372 F.Supp. 762, rev'g 360 F.Supp. 255. No decisions by the United States Court of Appeals on this point have been found.

The legislative history is unclear. Senator Williams interpreted the Act as providing only review of agency (Civil Service Commission) proceedings. 118 Cong. Rec. S2280 (daily ed. Feb. 22, 1972) (History at 1727). Senator Cranston originally agreed with Senator Williams, 118 Cong. Rec. S2287 (daily ed. Feb. 22, 1972) (History at

1744). Later he corrected himself and stated that 42 U.S.C. § 2000e-16 provides for a trial de novo. 119 Cong. Rec. S1219 (daily ed. Jan. 23, 1973).

A distinction between federal and private employees is justified for the reasons stated by the court in Hackley v. Johnson, 360 F.Supp. 1274 (D.D.C.), and by the fact that the administrative proceedings relating to Government employees are always handled under the Civil Service system which has developed procedures and standards applicable to such employees. The complaints of the nature here considered should be handled as others, and if they reach the courts, the procedure should be consistent with those under 5 U.S.C. § 701 et seq. Thus there is a valid distinction to be made, and we hold that a de novo hearing is not here required.

The record before us, derived from the Civil Service system hearings and reviews, is detailed, and the facts are thoroughly developed. In the event a trial court should find a need for additional facts on a particular issue, the matter may be remanded.

Our decision in Nickol v. United States, 501 F.2d 1389 (10th Cir.), was filed shortly after summary judgment was granted against Salone. And in any event the opinion of the district judge gives sufficient indication of the facts relied on by him from the administrative record to support his conclusions as to the administrative decision.

The order of the district court affirming the decision of the Civil Service Commission Board of Appeals and Review is affirmed.

No. 74-1600

Supreme Court, U. S.
FILED
AUG 12 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

ANTHONY M. SALONE, JR., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

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In the Supreme Court of the United States

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MEMORANDUM FOR THE RESPONDENTS

The question presented by the petition in this case is the same as that presented by the petition in *Chandler* v. *Roudebush*, No. 74-1599: whether district courts must conduct trials *de novo* with respect to federal employment discrimination complaints brought under Section 717(c) of the Civil Rights Act of 1964, as amended, 42 U.S.C. (Supp. III) 2000e-16(c).

We have acquiesced in the granting of the petition for a writ of certiorari in *Chandler* because the courts of appeals have reached conflicting decisions on this important issue. The Third Circuit in *Sperling* v. *United States*, 515 F.2d 465, held that a *de novo* trial is required, while the Ninth Circuit in *Chandler* and the Tenth Circuit in the present case held that a *de novo* trial is not required.

While we do not oppose the granting of the petition for a writ of certiorari in this case, we see no need for the Court to hear argument both in this case and in *Chandler*. If the Court grants the petition in *Chandler*, we believe it would be appropriate to hold the present petition pending a decision in *Chandler*. Alternatively, if the Court grants both petitions, it would be appropriate to consolidate the cases.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.

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PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Although the government does not oppose certiorari in this case or *Chandler* v. *Roudebush,* No. 74-1599, and petitions for a writ of certiorari in *United States* v. *Sperling,* No. 75-247, the government suggests that the Court grant certiorari only in *Chandler,* and defer action in this case and *Sperling.* Petitioner maintains that certiorari should be granted in all three cases.

This Court has granted certiorari in related cases where the question presented was susceptible to a variety of answers some of which might lead to differing dispositions of those cases. This practice avoids the need for successive grants of certiorari and permits the Court to fashion a rule in the context of a variety of situations requiring concrete application, rather than in the abstract. See e.g. *Furman* v. *Georgia,* 408 U.S. 238 (1972); *compare United*

States v. *Ortiz*, 45 L.Ed 2d 623 (1975) *with United States* v. *Brignoni-Ponce*, 45 L.Ed. 2d 607 (1975). In litigation under section 717 the lower courts have fashioned more than half a dozen different standards as to when a *de novo* trial is required. Petition 11-13.

Sperling, *Chandler* and *Salone* present a variety of factual situations. Petitioner Chandler sought unsuccessfully to engage in discovery; respondent Sperling indicated a willingness to submit his case on the administrative record, but insisted the court make an independent determination as to whether there was discrimination;[1] petitioner Salone's case was dismissed before he could begin discovery, and the merits of his case must turn, *inter alia*, on the credibility of witnesses who never were required to testify in court. In Salone's case, though not in all others, the administrative record involved conflicts in sworn testimony. In *Salone* both the investigator and the hearing officer found for petitioner only to be reversed by higher authorities; in *Sperling* no such finding was made. Mr. Salone was represented in the administrative proceeding by an attorney; petitioner Chandler was not. Although petitioner maintains that a *de novo* hearing is required in all three cases, the Court might choose to formulate a standard under which the factual differences among these cases would be of significance; such a formulation should be based on a familiarity with the broad diversity of circumstances present in federal employment litigation and revealed by *Salone*, *Chandler* and *Sperling*.

The courts of appeals decisions in these three cases differ so widely that a decision in any one case might not be dispositive of the others. The Ninth Circuit in *Chandler* afforded petitioner an independent decision on the merits

[1] 515 F.2d 465, 460 (3d Cir. 1975).

but forbade the introduction of additional evidence, whereas the Tenth Circuit in *Salone* both forbade such evidence and declined to require such an independent decision; thus if *Chandler* were affirmed on the ground that further evidence could not be introduced, *Salone* would thereafter have to be heard to consider whether the Tenth Circuit erred in not requiring the decision afforded by the Ninth Circuit. Conversely, if *Chandler* were reversed on the ground that that petitioner was entitled to introduce additional evidence, certiorari would then have to be granted in *Sperling* to decide the appropriate standard where no such evidence was proffered.

Even where a single question of law is at issue, several cases are appropriately considered together if the Court's decision ought to reflect a knowledge of the factual situation in which that question arises as revealed by a variety of cases. See e.g. *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *compare N.L.R.B.* v. *J. Weingarten, Inc.*, 43 L.Ed 2d 171 (1975) *with I.L.G.W.U.* v. *Quality Mfg. Co.*, 43 L.Ed. 2d 189 (1975). Resolution of the *de novo* issue would be aided by understanding of the federal administrative processes for handling complaints of employment discrimination. While petitioner maintains that a *de novo* trial is required by both the language and legislative history of Title VII, that conclusion is also supported by the grave defects of the administrative process. Petitioner contends that that process does not and is not designed to unearth the relevant evidence, and that the fact finding process is so tainted by a conflict of interest on the part of the defendant agency as to be inherently unreliable. See Brief for Petitioner in *Brown* v. *General Services Administration*, No. 74-768. The severe limitations in the administrative process is best perceived in the context of several different cases in which the administrative complaints were

processed in a variety of ways and rejected for different reasons.

The only reason suggested by the government for granting certiorari solely in *Chandler* is that the government maintains that the judgment in *Chandler* "is correct," but makes no such assertion as to the judgment in *Salone* and does not claim that *Sperling* was wrongly decided. The government's belief that it is more likely to prevail in *Chandler* than in *Salone* or *Sperling* is not, however, among the factors which the Court considers in exercising its discretion to grant certiorari. See Rules of the Supreme Court Rule 19(1).

For these reasons certiorari should be granted in all three cases to review the conflicting decisions in *Salone, Chandler* and *Sperling.*

Respectfully submitted,

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